DR. A. DUTT v. ASSUNTA HOSPITAL

[F.C. (Raja Azlan Shah C.J., Wan Suleiman & Chang Min Tat F.JJ.) January 22 & February 19, 1981] [Kuala Lumpur — Federal Court Civil Appeal No. 276 of 1980]

Administrative Law — Application for certiorari — Award of industrial court — Whether consultant radiologist in hospital a workman — Whether workman dismissed without just cause or excuse — Whether trade dispute exists — Award of compensation in lieu of reinstatement — Whether in excess of jurisdiction — Industrial Relations Act, 1967, ss. 2, 20, 26 & 52(2).

Labour Law — Powers of Industrial Court — Whether consultant radiologist in hospital a workman — Meaning of "workman" — Whether dismissal was without just cause or excuse — Whether trade dispute exists — Award of compensation in lieu of reinstatement — Industrial Relations Act, 1967, ss. 2, 20, 26, 30 & 52(2).

Practice and Procedure — Application for certiorari — Time limit for application — Statement setting out relief sought and the grounds thereof — Rules of Supreme Court, U.K. O. 59, rr. 3 & 6 — R.H.C. 1980, O. 53 rr. 1, 1A & 3.

Interpretation of statutes — Words in plural include singular — Interpretation Act, 1967, s. 4(3).

In this case the Industrial Court had made an award in which it held that the appellant was a workman and that he had been dismissed without just cause or excuse. The court did not award reinstatement but instead awarded compensation in lieu of reinstatement amounting to $522,000. The respondents applied for an order of certiorari to quash the award. The grounds of the application were —

(a) that the appellant was not a workman within the meaning of the Industrial Relations Act, 1967;

(b) that the Industrial Court wrongly held that the appellant had been dismissed without just cause or excuse;

(c) that the Industrial Court exceeded its jurisdiction in awarding compensation in lieu of reinstatement.

The High Court held that the Industrial Court had not committed any jurisdictional error in holding that the appellant was a workman or that he had been dismissed without just cause or excuse. It however held that the award of compensation in lieu of reinstatement was made without jurisdiction and the award was quashed. The appellant appealed to the Federal Court and the respondents cross-appealed.

Held: (1) the Industrial Court had not erred in law or in fact in arriving at its conclusion that the appellant was a workman within the Industrial Relations Act;

(2) a claim for reinstatement in employment by a workman is a trade dispute between the employer and the claimant connected with the non-employment of the claimant, just as much as the complaint of a number of workmen through their trade union;

(3) the Industrial Court in this case had come to a finding of fact that the motive for the termination of the services of the appellant was oblique and therefore it was justified in holding that the appellant had been dismissed without just cause or excuse;

(4) the right to compensation must be an issue in representations for reinstatement and necessarily arises where the court would not order reinstatement. The Industrial Court may therefore properly award compensation where the dismissal is without just cause or excuse, if in its considered view, it did not think reinstatement should be ordered;

(5) the question whether the appellant was a workman within the meaning of the Industrial Relations Act was a mixed question of law and fact. Whether he had been dismissed without just cause or excuse was a pure question of fact. No order of certiorari could lie for error on those two grounds and the cross-appeal of the respondent must therefore be dismissed;

(6) even if the award of compensation contained one or more errors upon its face, the error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court. The appeal must therefore be allowed and the award of the Industrial Court restored.

Semble: there appeared to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the respondents but no point was taken by counsel for the appellant at any stage of the proceedings.

Cases referred to:-

(1) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

(2) *South East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165; [1980] 2 All E.R. 689.

(3) *Pearlman* v. *Harrow School* [1979] 1 Q.B. 56, 70.

(4) *Assunta Hospital* v. *Dr. A. Dutt* [1980] 1 M.L.J. 96.

(5) *Assunta Hospital* v. *Dr. A. Dutt* [1981] 1 M.L.J. 115.

(6) *Tong Lee Hwa & Anor.* v. *Lee Yoke San* [1979] 1 M.L.J. 24.

(7) *Lee Wah Bank* v. *National Union of Bank Employees* K.L. High Court O.M. No. A15 of 1980 (unreported).

(8) *Vine* v. *National Dock Labour Force* [1957] A.C. 488.

(9) *Francis* v. *Municipal Councillors of Kuala Lumpur* [1962] M.L.J. 407; [1962] 1 W.L.R. 1411.

(10) *Rex* v. *National Arbitration Tribunal* [1948] 1 K.B. 424.

(11) *A. Raseal Muthiriar & Co., Ipoh* v. *National Union of Cigar Workers, Malaysia* [1969] 1 M.L.J. xxxv.

(12) *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] A.C. 387.

(13) *Doe* v. *Bridges* (1831) 1 B & Ad. 847, 859; 109 E.R. 1001.

(14) *British Transport Commission* v. *Gourley* [1956] A.C. 185.

(15) *Bengal United Tea Co. Ltd.* v. *Ram Labhaya & Ors.* A.I.R. 1961 Assam 30.

(16) *Workmen of Dimakuchi Tea Estate* v. *Management of Dimakuchi Tea Estate* A.I.R. 1958 S.C. 353.

(17) *National Union of Commercial Employees & Anor.* v. *M.R. Meher & Ors.* A.I.R. 1962 S.C. 1080.

(18) *Management of M/S T.B. Hospital, New Delhi* v. *The Workmen,* A.I.R. 1970 S.C. 1407.

(19) *Federated State Schoolteachers' Association of Australia* v. *State of Victoria & Ors.* 41 C.L.R. 569.

(20) *Rex* v. *National Arbitration Tribunal ex parte Bolton Corporation* [1941] 2 K.B. 405.

(21) *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166.

(22) *Australian Timber Workers Union* v. *Monaro Sawmills Pty. Ltd.* (1980) 29 A.L.R. 322.

(23) *R.B. Diwan Badri Dass & Ors.* v. *Industrial Tribunal, Punjab, Patiala & Ors.* A.I.R. 1963 S.C. 630.

(24) *Bharat Bank Ltd., Delhi* v. *Employees of Bharat Bank Ltd., Delhi* A.I.R. 1950 S.C. 188.

(25) *D.N. Banerji* v. *P.R. Mukherjee & Ors.* A.I.R. 1953 S.C. 58.

(26) *A.R. Varma & Anor.* v. *Mettur Industries Ltd.* A.I.R. 1961 Mad. 393.

(27) *L. Michael & Anor.* v. *Johnson Pumps Ltd.* A.I.R. 1975 S.C. 661.

(28) *Goon Kwee Phey* v. *J. & P. Coats (M) Bhd.* Penang O.M. No. 27 of 1979; F.C. Civil Appeal No. 173 of 1980.

(29) *Hotel Jaya Puri Bhd.* v. *Union of Hotel, Bar and Restaurant Workers & Anor.* [1980] 1 M.L.J. 109.

ORIGINATING MOTION.

S.K. Peddie (*James Puthucheary* with him) for the applicant.

G. Sri Ram for the first respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: This is an application for an Order of Certiorari to quash an Industrial Court

Award — Award No. 178/79 handed down on December 22, 1979. There were many grounds set out in the Statement filed by the applicant but during the hearing of the application only three main grounds were argued. The three grounds which form the subject of this judgment can be briefly restated as follows:—

(1) The Industrial Court exceeded its jurisdiction in holding that the first respondent was a "workman" within the meaning of the Industrial Relations Act, 1967;

(2) The Industrial Court exceeded its jurisdiction by holding that the first respondent was dismissed without just cause or excuse thereby failing to recognise the right of the applicant as employer under the contract to terminate the service of the first respondent; and

(3) The Industrial Court exceeded its jurisdiction in awarding a huge sum of $522,000 purporting to be compensation in lieu of reinstatement in a matter referred to it under section 20 of the Industrial Relations Act, 1967.

Some brief background is necessary. *D* an Indian citizen was engaged by the applicant as a radiologist in the hospital. *D* was first engaged sometime in September, 1963 and the first contract was for a period of three years subject to termination either way with three months' notice. The contract between *D* and the applicant was renewed a number of times until 1969 with the same terms and conditions. However, before the expiry of the contract in September, 1969 the existing contract came to be reviewed and the Hospital Board notified *D* in writing of certain proposed changes in the new contract offered also for three years. *D* ultimately accepted the reviewed contract dated October 20, 1970 effective for three years until the end of August, 1972. In September, 1972 another contract modifying slightly the terms and conditions was offered to *D* which terms and conditions were also accepted. It was during this period that some difficulties emerged between *D* and the hospital administration. In any case as a result of a meeting of the Hospital Board on November 27, 1975 a letter was written the next day to *D* which read as follows:—

"The Board has been considering your contract and we feel that it should be reviewed.

Accordingly, this letter will give you formal notice of termination. The notice will commence on December 1 and the contract will terminate on February 29, 1976.

The Board, however, is prepared to consider entering into a new contract with you, although the terms will not be quite the same as the existing contract."

The Industrial Court in its award dealt at length with this letter and made specific findings on the subsequent paragraphs of the same letter one of which paragraphs reads as follows: —

"Before considering renewing (meaning 'reviewing') your contract we would require to hear from you that you had taken due note of the various matters mentioned above and that you undertake that there will in no circumstances be any recurrence of unseemly or objectional behaviour and that you appreciate that your department is simply a department of the hospital and is subject to the general administration of the hospital in the same manner as all other departments."

The Industrial Court found that this among other paragraphs clearly threw several aspersions by reason of which the claimant's contract was terminated. The Industrial Court also found that the terms and conditions differed from the previous contract and some of the conditions were adverse to *D*. Such conditions are set out at pages 14 to 15 of the award and they are as follows:—

"(i) Claimant's designation as mere Consultant, a downgrading from Senior Consultant and as Director of Radiology and Head of the Department.

(ii) No passage of double return by air for him as an expatriate, to Calcutta and back.

(iii) No duration of the engagement, either 'permanent' as before or for a 'fixed period' as previously.

(iv) Reduction in annual leave from 6 weeks to 33 days, not to be accumulated without prior permission.

(v) For the first time, radiation leave of 14 days a year.

(vi) No private practice and the cut-down from 50% to 30% of all radiological fees inclusive of reporting fees.

(vii) Night call at $35 a visit."

The argument that *D* was not a workman within the meaning of the Industrial Relations Act, 1967 was canvassed very early during the hearing before the Industrial Court. Whether *D* was a workman or not was a question of interpretation to be applied to the facts of the case. Even if the Industrial Court was wrong in its interpretation of the definition of 'workman' in the 1967 Act, would that amount to an error of jurisdiction? Lord Reid in *Anisminic Ltd.* v. *Foreign Compensation Commission*[1] said that there are many cases where, although the tribunal had jurisdiction to enter on an inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. For example, it may have given its decision in bad faith or it may have made a decision which it had no power to make or it may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. Lord Reid continued at page 171 as follows:—

"I do not intend this list to be exclusive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Lord Pearce in the same case at page 195 of the judgment said that lack of jurisdiction may arise in various ways. For example, the tribunal may at the end make an order that it has no jurisdiction to make, or it may take into account matters which it is not directed to take into account.

These are all instances where error of jurisdiction is clear. But there are case where in practice it would be difficult or almost impossible to ascertain whether an error of law on the face of the record amounts or does not amount to an error of jurisdiction unless one goes into the merits of the case. Thus there is a distinction between an error of law which affects jurisdiction and an error of law which does not affect jurisdiction. This distinction is shown in the judgment of the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case[2] at page 167 where Lord Fraser said:—

"But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective."

The same distinction made in the dissenting opinion of Geoffrey Lane L.J. (as he then was) in *Pearlman* v. *Marrow School*[3] was approved by the Privy Council —

"... the only circumstances in which this court can correct what is to my mind the error of the (county court) judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration ... or addition'."

However, the question whether *D* was a workman under section 20(1) of the Act was not only posed to the Industrial Court but also the High Court in *Assunta Hospital* v. *Dr. A. Dutt.*[4] Thus it was raised during argument that this court may be barred from considering the question whether *D* was a "workman" within the meaning of the Industrial Relations Act, 1967 since it is said that the same question had already been dealt with by the High Court and the appeal against the decision was dismissed by the Federal Court. That was an application for an order of prohibition against the Industrial Court and one of the grounds submitted was that *D* was not a workman under the 1967 Act since his contract with the hospital was a contract for service and not a contract of service. Looking at the judgment in that case I was at first in doubt whether *res judicata* applies here. This doubt was however removed when the Federal Court handed down its judgment on the appeal on November 5, 1980.[5] For the doctrine of *res judicata* to apply it has to be shown not only that there was a former suit between the same parties for the same matter and upon the same cause of action but also that the matter directly and substantially in issue has been heard and finally decided. As was also said by the Federal Court in *Tong Lee Hwa & Anor.* v. *Lee Yoke San*[6] the earlier decision must necessarily and with precision have determined the point in issue. The Federal Court has answered the first question in the affirmative and therefore *res judicata* clearly applies.

The next question for consideration is whether the Industrial Court exceeded its jurisdiction by finding that what was described by the applicant as a normal termination of service under the contract for the purpose of reviewing the terms of the contract to be dismissal without just cause or excuse. It is very clear from the award that the Industrial Court made its findings that it was really a dismissal and not termination simpliciter. The Industrial Court dealt with various factors surrounding the so-called termination and review very thoroughly. Before coming to its decision on the question the Industrial Court dealt at length with not only the letter of termination but also the surrounding circumstances with special reference to the human relationship between *D* and the management of the hospital. All these considerations were absolutely within the jurisdiction of the Industrial Court to make. In my view it has not been shown that the Industrial Court has committed any jurisdictional error to justify any interference by this court.

Finally we come to the more difficult question whether the Industrial Court exceeded its jurisdiction in making the award of a sum of $522,000 purporting to be the total amount of compensation in lieu of reinstatement. Having found that *D* was dismissed without just cause or excuse the Industrial Court also found that reinstatement could not be granted because of the atmosphere of animosity between the parties. Judging from the award the Industrial Court would appear to be guided by what it considered to be its powers under subsection (5) of section 30 which provides that the Industrial Court shall act "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form." I do not propose to quarrel with the reasoning ably set out in the award but will instead deal with the more basic issue.

The basic question is how wide are the powers of the Industrial Court to provide for reliefs under section 30(6) of the Act after hearing a reference under section 20(3). What is the extent of the powers of the Industrial Court under section 30(6) of the Act was also the question posed in another application for certiorari in *Lee Wah Bank* v. *National Union of Bank Employees*[7] which question I attempted to answer in the context of that case. I said then that the whole question would evolve around the interpretation that should be given to the powers of the Industrial Court in making an award under section 30 of the Act. More specifically, I said how wide are the powers of the court under section 30(6) of the Act. In that case I found firstly that I was unable to find any ground to support the proposition that the powers of the Industrial Court under that subsection should be liberally construed. Secondly, I found that the apparent broadness of the language of that subsection does not go beyond what is already conferred on any person or body by section 40(1) of the Interpretation Act, 1967 that is to say the broadness of language to include only such powers which are necessarily implied and nothing more. This is because the Industrial Court is a creature of statute and its powers must be discovered only from the four corners of the statute — expressly or by necessary implication.

To answer the question whether in a reference under section 20 of the Act the Industrial Court can by virtue of section 30(6) of the Act make an award to provide for reliefs other than reinstatement, we have first of all to analyse section 20 in its proper perspective. Without much difficulties it can be seen that there are three features which stand out about section 20 of the Industrial Relations Act, 1967. Firstly, it is a provision especially incorporated into the Act subsequently and not part and parcel of the original scheme of the Act. The Industrial Relations Act, 1967 was a consolidation of a number of legislation on trade disputes hitherto existing which legislation are set out in section 63 of the Act. Section 20 and its predecessors (section 16A and section 17A) were added to the Act in the massive exercise on labour legislation embarked upon by the National Operations Council in 1969-1970. Among the amendments was the new provision which extended the "Workmen's Charter" to include workmen who are not members of any trade union. Therefore section 20 as we now have is a provision especially grafted into the Act to provide relief to workmen who are not members of any union who consider themselves to have been dismissed without just cause or excuse. Secondly, it can also be seen that section 20 is a provision which has created an inroad into the common law by providing a relief of reinstatement to a workman who has been dismissed without just cause

or excuse which remedy is in effect tantamount to specific performance of a contract of service and which remedy was hitherto unknown to common law or equity. Thus it can be accepted that the relief of reinstatement in the proper case by the Industrial Court under section 20 of the Industrial Relations Act, 1967 is a sort of statutory order for specific performance of a contract of service which is therefore a relief entirely outside the stream of the common law. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, namely, the award of damages. In an action for damages for wrongful dismissal the common law court may award damages and in appropriate cases may also exercise the discretion to grant a declaration — see also *Vine* v. *National Dock Labour Force*,[8] *Francis* v. *Municipal Councillors of Kuala Lumpur*[9] and *Rex* v. *The National Arbitration Tribunal*.[10] Thirdly, it can also be seen that section 20(1) of the Act provides an option to a workman who is not a member of any union to seek his remedy either under the common law for damages for wrongful dismissal or seek his remedy in the Industrial Court which machinery is provided by section 20 of the Act and significantly subsection (4) provides that where an award has been made under subsection (3), *the award shall operate as a bar to any action for damages* by the workman in any court in respect of wrongful dismissal." (emphasis mine). Before the introduction of section 20 of the Act the Industrial Court could hear only reinstatement cases in the collective sense, that is to say the Industrial Court could hear a union only in relation to claims concerning persons who are members of the union at the date of the alleged dismissal and such members had continued to be members of the union. Thus the Industrial Court rejected the claim for reinstatement where the workman concerned became engaged in an occupation which did not fall within the rules of the union thereby ceasing to be a member of the union — see *A. Raseal Muthiriar & Co., Ipoh* v. *National Union of Cigar Workers, Malaysia*.[11]

Relevant for our examination presently are subsections (1) and (3) of section 20 of the Act which read as follows:—

"20. (1) Where a workman *who is not a member of a trade union of workmen* considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General *to be reinstated in his former employment;* the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court *for an award.*" (emphasis mine).

In my view it is obvious from the words emphasised in these subsections that section 20 is a special provision available only to a workman who is not a member of a trade union who considers himself to have been dismissed without just cause or excuse to refer his matter for arbitration so as to be reinstated in his former employment. Secondly, it is also obvious that if the Minister after having been referred to by the Director General on the reference refer the representations to the Industrial Court the Court may or may not give an award and if an award is given the award shall operate as a bar to any action for damages under the common law.

Under the scheme of section 20 it seems clear in my view that an award if made by the Industrial Court is the award referred to in the representation, namely reinstatement. Strictly speaking, in the context of section 20 therefore the relief is only confined to reinstatement. It is said that in practice the Industrial Court has conferred upon itself a discretion to award compensation in lieu of reinstatement in appropriate cases. I think it relies on subsection (5) for this, i.e., its powers in equity and good conscience. It must not be forgotten that the Industrial Court is essentially a court of arbitration especially for the purpose of dealing with any trade dispute referred to it (section 22(1)). Subsection (5) of section 22 of the Act provides that notwithstanding these general powers the Industrial Court may also deal with any reference to it under section 20(3) of the Act. It is when making an award in respect of a trade dispute that the Industrial Court is conferred wide powers to have regard to public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries by subsection (4) of section 30 of the Act. The question is therefore can the Industrial Court in a reference under section 20(3) rely on section 30(6) of the Act to provide for any other relief in addition to or in lieu of reinstatement.

The present section 30(6) was the previous section 27(6) in the original Industrial Relations Act, 1967. In my opinion section 30(6) contains too general a wording or too broad a language to enable the Industrial Court to override statutory provisions although the language is broad enough to enable the Industrial Court to modify the common law if such modifications are within the limits of subsection (5) of section 30 of the Act, which directs that the Industrial Court shall act according to equity and good conscience. In my view the Industrial Court while obliged and empowered to proceed according to equity and good conscience is not a court of equity in the technical sense. It cannot therefore usurp or duplicate the functions of the common law courts, in this country, the civil courts established under the Constitution and the Courts of Judicature Act, 1964.

A principle is established in *Pasmore* v. *Oswald-Twistle Urban Council*[12] that where an Act creates an obligation and provides a remedy no other remedy can be adopted. At page 394 Earl of Halsbury L.C. said:

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges*.[13] He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'"

A reinstatement order carries with it a *prima facie* right to an order for the recovery of wages since the date of dismissal. Such an order is ancillary to the order of reinstatement. But circumstances vary from case to case and an employer should be entitled to a

remission for various reasons, for example, for any delay in the finalisation of the order which is not entirely his fault.

My conclusions on this last question are therefore as follows:—

(1) Because as I said earlier section 20 is a special provision providing a relief to workmen who are not members of any union and therefore outside the original general scheme of the Act the relief provided in section 20 should be strictly construed.

(2) Because section 20 provides for a relief which in effect amounts to a specific performance of a contract of service, a remedy not normally obtainable in common law, the relief should be construed as a special relief and also to be strictly construed.

(3) Because an award pursuant to a representation under section 20 operates as a bar to an action for damages under the common law by the workman in question the legislature clearly distinguishes the two options available to the workmen and any relief which is not directly connected with or ancilliary to reinstatement will be outside the powers conferred by section 30(6) of the Act;

(4) While obliged and empowered to act according to equity and good conscience, the Industrial Court is not a court of record and being a creature of statute its powers are to be derived solely from the four corners of the statute that creates it.

In the context of section 20 of the Industrial Relations Act, 1967 the award is indeed in my view in excess of jurisdiction. I accordingly make an order in terms of the Notice of Motion.

From the above judgment the respondent appealed to the Federal Court.

FEDERAL COURT.

G. Sri Ram for the appellant.

S.D.K. Peddie (*James Puthucheary* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The appellant, Dr. A. Dutt, was a consultant radiologist employed by and at the Assunta Hospital under several letters of appointment. The last, dated September 1972, described, *inter alia,* that the period of engagement was permanent with however a break clause providing that the contract could be terminated with 3 months' notice on either side. The word "permanent" is perhaps unfortunate. But there can be no doubt that the contract offered a certain security of tenure. It clearly followed the tenor of all previous contracts.

In 1972, the Hospital underwent a reorganisation. Some four years later, the new management, on November 28, 1976, wrote the following letter to Dr. Dutt of which the relevant paragraphs read as follows:

"Dear Dr. Dutt,

The Board has been considering your contract and we feel that it should be *reviewed.*

Accordingly, this letter will give you *formal notice of termination.* Due notice will commence on 1st December and the contract will terminate on 28th February, 1976.

The Board, however, is prepared to consider entering into a new contract with you although *the terms will not be quite the same as the existing contract.*

....

Yours sincerely,

DATUK LEE ENG TEH,
Chairman,
Board of Directors."

(Emphasis supplied).

The purpose of this letter is clearly to re-negotiate the terms of employment. The new terms offered were contained in a letter dated January 21, 1976 and were designed to reduce the proportion of the fees charged to and paid by first-class and private clinic patients which was payable to Dr. Dutt. Dr. Dutt declined to accept these new terms. The Hospital regarded his employment as terminated on February 29, 1976. Dr. Dutt however considered that he had been dismissed without just cause and excuse and on his representation and failing any compromise or settlement, the Minister of Labour and Manpower referred the matter to the Industrial Court.

Dr. Dutt was not a member of any union of employees and the reference was one under section 20(3) of the Act 1967, as amended, (the Act). The Hospital tried by every means to resist the hearing of the reference. It applied for an order of prohibition to prevent the Industrial Court from proceeding in the matter and pending the decision of the High Court and the hearing of the appeal therefrom by the Federal Court, deliberately dragged its feet. The hearings before the Industrial Court which commenced on July 5, 1976, were in consequence not concluded until June 28, 1979, almost 3 years later. What one would have thought was a relatively simple and uncomplicated matter actually occupied the court as many as 63 days. The Chairman, who sat, was conscious that by section 30(3),

"(3) The court shall make its award without delay and where practicable within thirty days from the date of the reference to it of the trade dispute or of a reference to it under section 20(3)"

he was required to hear the case speedily and hand down his award or dismiss the reference. But though he showed his displeasure over the tactics employed by counsel for the Hospital and though he was highly critical of such delays and the reasons expressed or implied for them, there was really nothing much he could do about it, when confronted with the *idee fixe* of counsel that until the High Court and the Federal Court had given their decisions on the application for prohibition which he considered had excellent chances of success, it would be a waste of time to continue with the hearing. For the prohibition process, reference should be made to Federal Court Civil Appeal No. 144 of 1976.[5]

The Industrial Court finally handed down its award on December 22, 1979 dismissing every objection by the Hospital and awarding Dr. Dutt $522,000 as compensation in lieu of reinstatement, but it was not until March 19, 1980 that the Hospital applied for leave for an order of *certiorari.* At that point in time, the Rules of Court in force (the Rules of the High Court 1957) contained no direct provisions limit-

ing the time for making the application for such leave and requiring a statement to be filed in support of the application. But the then Order 1 rule 2 provided that the application should be made in the same manner as the like application in the High Court of Justice in England. Therefore, under Order 59 rule 4, Rules of the Supreme Court 1883, see Annual Practice 1957, the application which had been made within 6 months was in time but was also defective because it lacked the statement "setting out the name and description of the applicant, the relief sought and the grounds on which it is sought": Order 59 rule 3, Rules of the Supreme Court 1883. There is however a supporting affidavit but an affidavit should not be anything more than an averment of facts under oath or affirmation.

There appears therefore to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the hospital. No point was however taken by counsel for Dr. Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980 continue largely the same practice, Order 53 rule 1(2) requiring such a statement, rule 1A limiting the time for such an application, now, to 6 weeks of the order sought to be quashed and rule 3(1) providing that subject to the discretion of the court, no grounds shall be relied upon and no reliefs sought except those set out in the statement. We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and because as will be seen, this amorphous application enabled the hospital to roam at large, well outside its proper confines.

Lacking the statement, the High Court resorted to the affidavit of Datuk Lee Eng Teh for the grounds on which the application was sought. We would observe that even under the old rules, Order 59 rule 6 provided that unless the court in its discretion allowed an amendment, no grounds should be relied upon or any relief sought except the grounds and relief set out in the statement: see now Order 53 rule 3(1) Rules of the High Court 1980. But as will be seen, at least two of them became transformed into something completely different.

Datuk Lee Eng Teh's first ground was Dr. Dutt's citizenship status or rather the lack of it, as a bar to reinstatement or even employment. It was not pursued at the hearing in the High Court. Possibly by this time counsel for the Hospital had read the judgment of this court in upholding the High Court's decision refusing the application for an order of prohibition for this ground.

Three other grounds were made out and argued. The first was that Dr. Dutt was not a workman as his contract was one for services and not of service. This ground was abandoned and it was argued instead that he was not a workman within the definition of a workman in the Act on a proper interpretation. Further and in the alternative, Dr. Dutt had not been dismissed so as to acquire a right of recourse under section 20 of the Act which, it is said, is limited to a case of dismissal without just cause or excuse and does not include a case of contractual termination. The third was, in the words of Datuk Lee Eng Teh in paragraph 17 of his affidavit:

"17. (I am also advised) that the Industrial Court in making the Award of Compensation in lieu of reinstatement erred in not taking into consideration (Dr. Dutt's) income tax liability for the compensation awarded."

This ground is clearly one of the application of established legal principles in the assessment of awards. The complaint would appear to be the failure of the Industrial Court to apply the principle laid down in *British Transport Commission* v. *Gourley*.[14] But this ground became transformed, again without objection, to an argument that under section 20 of the Act, a workman who claimed to have been dismissed without just cause or excuse must ask for reinstatement only and on this claim, he gets either an order for reinstatement or nothing at all.

On this last ground, the Hospital succeeded, and the High Court set aside the award of compensation made by the Industrial Court to Dr. Dutt. Otherwise the learned judge found that the Industrial Court had come to a right decision in holding that Dr. Dutt was a workman within the definition in the Act and that he had been dismissed without just cause or excuse.

Dr. Dutt now appeals from the order over-ruling the award to him by the Industrial Court. The hospital cross-appeals against the other two findings of the High Court. The three grounds therefore come up for consideration by us.

1. *Whether Dr. Dutt was a workman within the meaning of the Act*

It is to be observed that in the application for prohibition, the solicitors for the Hospital contended in the statement that Dr. Dutt's contract with the Hospital was a contract for services and not a contract of service and therefore he was not a workman under the Act.

In the current application for *certiorari*, Datuk Lee Eng Teh in paragraph 9 of his affidavit affirmed that

"9. The Board of Directors at all material times did not employ (Dr. Dutt) as a 'workman' but retained his services as a professional radiologist. If he was employed as a 'workman' he would not be entitled to charge fees as he was allowed to do under the terms of the contract."

It contends, in our reading of it, very much the same thing — that Dr. Dutt provided services and not service and therefore in that distinction which crops up so often in arguments under the Employment Ordinance, he was not an employee.

Somehow by a process not easy to discern, a transformation has changed this contention to a strict interpretation of the definition of workman in the Act and the distinction between a contract for services and a contract of service is completely abandoned. It now argued that by definition, if the natural meaning of the word was used, Dr. Dutt was not a workman. We are urged to apply this natural meaning of the word.

We are not referred to any dictionary meanings,

possibly for the simple reason that they are, as in so many cases, not of any great assistance. In one sense a workman is a manual labourer and also a skilled craftsman. It is in this sense that Mr. J. Puthucheary (who did not appear in the Industrial Court) urges that a doctor is not a workman, nor is a surgeon, or an accountant, or a lawyer or, for good measure, a judge. There must be a proper respect for class distinctions. One would have thought, however, that the modern tendency, at least in some societies, is to break down class distinctions, so that the appellation of workman loses much of its distaste. Nevertheless, the industry of Mr. J. Puthucheary has enabled him to cite several decisions.

In *The Bengal United Tea Co. Ltd.* v. *Ram Labhaya & Ors.*,[15] it was held that a medical officer would not have been a workman but for the amendment of "any person employed ... in any industry to do skilled or unskilled manual or clerical work..." to include supervisory and technical staff also.

In *Workmen of Dimakuchi Tea Estate* v. *Management of Dimakuchi Tea Estate*,[16] Dr. K.A. Bannerjee was held not to be a workman, on the argument that he belonged to the medical or technical staff which is a different category altogether from workmen, but as the High Court of Assam observed in *The Bengal United Tea Co. Ltd.* case, that was a decision before the new definition of the word was brought into force.

These Indian cases can perhaps be more easily understood and considered if the definition of a workman in the Indian Industrial Disputes Act 1947 is borne in mind. In its original form,

"(5). 'Workman' means any person employed...in any industry to do any skilled or unskilled manual or clerical work for hire or reward...."

As observed, this definition was, in 1956, amended by the addition of supervisory and technical staff to the category of workmen. Mr. J. Puthucheary therefore stresses that this amendment makes a vital difference and that in the absence of such an addition, a doctor cannot be a workman.

With respect, we do not agree that the Indian cases are of any relevance at all. This submission ignores the words "in any industry" in the Indian definition which are altogether absent in the definition in our Act. The Supreme Court of India in *National Union of Commercial Employees & Anor.* v. *M.R. Meher & Ors.*[17] held that a solicitors' firm is not an industry. The test employed by the Supreme Court was the test of co-operation between the employer and his employees and it held that a Hospital would but a solicitors' firm would not satisfy that test. The importance of the words "in any industry" was also stressed in *The Management of M/s. T.B. Hospital, New Delhi* v. *The Workmen.*[18]

With respect, it does not seem to us that having regard to this difference in the definition, we can place the reliance on these Indian cases which Mr. J. Puthucheary urges us to do, nor on the Australian cases under the Commonwealth and Arbitration Act 1904-1950, e.g. *The Federated State Schoolteachers' Association of Australia* v. *The State of Victoria & Ors.*,[19] which held that the activities of the State relating to education did not constitute an "industry" within the meaning of the Act, which defined an employee as an employee in that industry.

Under the National Arbitration Order (St.R. & O. 1940 No. 1305) of England, the definition of workman to

"...mean(s) any person who has entered into or works under a contract with an employer, whether the contract be by manual labour, clerical work or otherwise...."

(which is identical to the definition in the Industrial Courts Act 1919) was held in *Rex* v. *National Arbitration Tribunal ex parte Bolton Corporation*,[20] *inter alia*, to include officers who had ceased to serve the Local Government to engage in war service. Viscount Caldecote C.J. held that those with professional administrative and technical duties were included. The words "or otherwise" were not construed *ejusdem generis*. On appeal to the House of Lords, *sub nom., National Association of Local Government Officers* v. *Bolton Corporation*,[21] the decision on the scope of workmen was not disturbed though the judgment of the Court of Appeal as to the right of the employers to determine in advance whether they would or would not make up the pay of such officers was overruled.

We now turn to the definition of workman in section 2 of our Act, since, as we have said earlier, it is this definition that must decide the status of Dr. Dutt.

"'workman' means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."

It must be observed, first, that the words "in any industry" are conspicuous by their absence and therefore a workman to be a workman under the Act needs not be engaged in "any business, trade, undertaking, manufacture" (if one can avoid "or calling of employees" in the definition of industry). It is therefore wide enough to cover a doctor in a hospital, even a consultant.

Secondly (and this is important also for the second part of this judgment), the word "and" is to be construed disjunctively, and in the case of a dismissal without just cause or excuse, the workman who is not a member of any trade union can make his representations on dismissal to the Director-General under section 20 (previously under section 16A, to the Minister for Labour and Manpower) while a workman who is a member of a trade union and who has been dismissed, discharged or retrenched or whose dismissal, discharge or retrenchment has led to a trade dispute, can refer his matter to the Industrial Court under section 26.

As for the determination whether Dr. Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital* v. *Dr. A. Dutt*,[5] said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as

to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service: see also *Australian Timber Workers Union* v. *Monaro Sawmills Pty. Ltd.*[22]

The Industrial Court on the evidence before it came to a finding that Dr. Dutt was a workman within the Act. On the application for *certiorari*, the learned High Court Judge held he was bound by the doctrine of *res judicata* to accept our previous decision in F.C.C.A. 144 of 1976 and to hold similarly and without discussion. At the appeal we agreed immediately with Mr. J. Puthucheary that we did not there decide that Dr. Dutt was a workman but, after hearing a full submission from him, we find that the Chairman of the Industrial Court had not erred in law or in fact in arriving at his conclusion that Dr. A. Dutt was a workman within the Act.

2. *Whether Dr. Dutt has been dismissed or his contract has been merely terminated in accordance with the contract*

As noted earlier, the contract of service provided for termination by either side by 3 months' notice. It is the case for the Hospital that having given this contractual notice, the termination of the service is not a dismissal, certainly not a dismissal without just cause or excuse and it does not give rise to a claim for reinstatement or for compensation, there being, it is claimed, nothing in the Act to prohibit a termination according to the contract.

It is however conceded by Mr. J. Puthucheary for the Hospital that in the case of a trade union, the non-employment of a workman is a proper subject for enquiry by the Industrial Court. This suggested dichotomy of treatment is said to arise from the interpretation of the various sections of the Act.

First, section 20(1) which is in these terms:

"20. (1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed."

A workman who is not a member of a trade union must make his claim for reinstatement in employment under this sub-rule. Dr. Dutt is not a member of any trade union and his claim was made under this sub-rule. It speaks of dismissal without just cause or excuse, and it will be better if this statutory term is used instead of the narrower term "unfair dismissal."

Next, section 26(1) reads:

"26. (1) Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the court on the joint request in writing to the Minister by the trade union representing the workmen who are parties to the dispute and the employer who is a party to the dispute or a trade union representing the employer."

This subsection must be read with the statutory definition of a trade dispute in mind. A trade dispute is defined as

"... any dispute between employers and workmen or between workmen and workmen or between employers and employers, which is connected with the employment or non-employment or the terms of employment or the conditions of work of any person."

It is argued by Mr. J. Puthucheary that by these provisions, the dismissal of a workman who is not a member of a trade union cannot be and does not amount to a trade dispute, since a trade dispute by definition concerns a number of workmen. Ergo, while under the Act, the contractual right to terminate the employment without reason of a workman who is a member of a trade union is lost, that right, by virtue of this dichotomy in the Act, remains in the case of a workman who is not a member of a trade union.

We reject this distinction in its entirety. It is completely artificial and unjustifiable on a proper construction of the relevant and other sections of the Act and it wholly defeats its purpose and aims. There is nothing in the definition of a trade dispute to suggest even remotely that it is restricted to a dispute between employers and a trade union representing the employees, or such of the employees as are members of it. But Mr. J. Puthucheary argues that that is the irresistible conclusion (and this is essentially the fundamental premise of his entire argument) to be drawn from the use of the plural of workmen. Apart from the absurdity which would result if the same argument is addressed to the expression "employers" so that where there is an employer who is an individual, there can therefore be no trade dispute with a union of his employees, it is in direct contravention of section 4(3) of the Interpretation Act, 1967 (No. 23 of 1967) which provides specifically that

"4(3). Words and expressions in the singular include the plural and words and expressions in the plural include the singular."

Section 20(1) admittedly speaks of a dismissal without just cause or excuse and makes that a reason for a claim for reinstatement in the employment. But the kind of award to be made by the court would not differentiate between a trade dispute and a reference to the court under section 20(3), if the definition of a trade dispute is read in the singular as a dispute between employer or employers and a workman which is connected with the employment or non-employment. So read, a claim for reinstatement in employment is fairly and squarely a trade dispute between the employers and the claimant connected with the non-employment of the claimant. It may well be that read this way, the expression "or a reference to it under section 20(3)" wherever it occurs in section 30 is tautologous, but if there is a choice between acceptance of tautology which evidently springs from an abundance of caution in the 1975 amendments to the Act, and saving the operation of the Act for a substantial portion of the workmen who are not members of a trade union, our preference is without hesitation for the latter course. It would save the Act as a piece of social legislation for all the workmen of the country who are not members of any trade union.

The long title to the Act describes it as

"An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising

from their relationship and generally to deal with trade disputes and matters arising therefrom."

In our view, the "relation between employers and workmen and their trade unions" must mean either relations between employers and workmen *inter se* where the workmen have not formed a trade union, the plural importing the singular, or relations between employers and the trade unions of their employees.

It follows, in our view, that the letter and spirit of the Act which Mr. J. Puthucheary concedes as extending to protect workmen who are members of a trade union from dismissal without just cause or excuse extend the same protection to a workman who is not a member of a trade union, so that despite the contractual provision of termination by notice, such a workman who considers he has been dismissed without just cause or excuse may make representations for reinstatement. It further follows that on a proper interpretation of the relevant sections of the Act, there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be justifiable; otherwise the Industrial Court may make an award. The only difference is the regard of the employer for the susceptibilities of the workman to the action being taken against him.

If this raises the hackles of employers and calls for denunciations about shackles on the freedom of contract, the following extract from the judgment of Gajendragadkar J. in *R.B. Diwan Badri Dass & Ors.* v. *Industrial Tribunal, Punjab, Patiala & Ors.*[23] at pp. 633-4 will provide the answer:

"The broad and general question raised... on the basis of the employer's freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice....

The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice.... Industrial adjudication does not recognise the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. *Similarly the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to (industrial) employees*...."

The judgment of Gajendragadkar J. also cited with approval a passage from the judgment of Mukherjea J. in *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank Ltd., Delhi*[24] at page 209 which perhaps deserves to be quoted

"In settling disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

Now the right to contract is, in the case of a trade union, restricted by law and, by the provisions of section 13(3), no trade union of workmen may include in its proposals for a collective agreement a proposal, *inter alia*, regarding the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination or for the dismissal and reinstatement of a workman. Clearly, therefore, the right to employment secured by the legislation for the workman must be balanced against the just requirements of the employer.

By the same token, the provision of "dismissal without just cause or excuse" in section 20(1) as a ground for a reference under section 20(3) implies in the case of a non-union workman that the right to "fire" implied in a "hire", in the social legislation of the Act, is limited to termination with just cause or excuse. Any other interpretation would fail to recognise that in entering into a contract of employment, the employer holds the sword by the hilt and requires the employee to grasp it by the blade and would make nonsense of the whole purpose and intent of section 20. Were it otherwise, all that the employer has to do would be to be prudent and provide in express terms for termination of the employment at will, and he would then escape the operation of the Act. But that would stultify the Act and offend well-known principles of interpretation of statutes.

Mr. J. Puthucheary has been able to find from his researches at least three cases: *D.N. Banerji* v. *P.R. Mukherjee & Ors.*,[25] *A.R. Varma & Anor.* v. *Mettur Industries Ltd.*[26] and *L. Michael & Anor.* v. *Johnson Pumps Ltd.*[27] in which it was held that the jurisdiction of the Tribunal was in no way limited or circumscribed by considerations based on the contractual provisions of termination, and the Tribunal can always scrutinise an innocent-looking order of "termination simpliciter" and if it finds it was not *bona fide* or reasonable, it has the jurisdiction to set it aside. The point that Mr. J. Puthucheary makes is that these cases refer, as they indeed do, to industrial disputes between the employers and workmen whose causes were espoused by their unions. But the undoubted industry of Mr. J. Puthucheary has not enabled him to uncover any case which lays down as a matter of judicial decision that "termination simpliciter" in the exercise of contractual provisions in the case of a workman, who is not a member of a trade union, is effective when it is without just cause or excuse. With all due respect, we are unable to find anywhere in any of these three judgments any reasoning that union representation is the *sine qua non* for the right to security of employment to accrue. We are of the opinion that this security of employment extends as much to non-union employees as to union workmen.

But all the arguments of Mr. J. Puthucheary ignore, first, the fundamental fact, to which we have already alluded, that the termination of Dr. Dutt's employment was for the expressed purpose of renegotiating to his detriment the terms of his emoluments and secondly, the finding of the Industrial Court of the strained relationship between Dr. Dutt and a Dr. Verghese, the Medical Superintendent of the Hospital and its executive officer to which the learned Chairman ascribed the real motive for the attempt to reduce Dr. Dutt's pay at a moment in time when all services both in the public and private sectors were receiving or negotiating for increases. On the evidence before him, the learned Chairman then came to a finding

of fact that the motive for the termination was oblique. This finding of *mala fides* must make unreal the attempt to acquire good faith by the purported exercise of a contractual right.

At this stage we feel constrained to refer to a missive sent by an officer of the Hospital to various members of the public extolling the virtues of and expressing the continued confidence of the Hospital in Dr. Verghese of whom the learned Chairman was however very critical as a witness and as an administrator. When this letter was sent to the judiciary it became most unfortunate and completely misguided, and where an application for *certiorari* was contemplated or an appeal lodged, it might very well become a contempt of court. We do not say that the letter was sent with the authorisation of the Hospital but we would have expected, if the fact is known, a disavowal from the Hospital. It should be common knowledge that any attempt at influencing the court is a punishable contempt.

3. *Whether a non-union employee in a reference for reinstatement can be awarded compensation instead?*

A non-union member would appear to be restricted in his representation to the Director-General under section 20(1), *supra,* on the ground of dismissal without just cause or excuse to a claim for reinstatement in his employment. He does not claim in the alternative. This may sound strange or even purposive to lawyers who are trained to plead every case or claim possible. But in our view, this is strictly logical. If a workman complains he has been dismissed without just cause or excuse, it does mean that he is dissatisfied with his dismissal or termination of service and he wants his job back. However there may exist circumstances and reasons why reinstatement should not be ordered. Where such circumstances and reasons exist, Mr. Peddie who argues this point for the Hospital and who similarly did not appear in the Industrial Court, suggests that the Industrial Court may not award compensation, section 20(1) being restricted to a prayer for reinstatement, nothing in section 20 refers to any compensation and section 30, the amendment notwithstanding, cannot add something which section 20 does not give. The only recourse the workman has is to turn to the common-law courts for damages for wrongful dismissal.

The awards that an Industrial Court can make are set out in section 30 of which the relevant subsections are as follows:

"30. (1) The court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under section 20(3), to make an award (including an interim award) relating to all or any of the issues in dispute.

....

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form

(6) In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of a trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3)."

Be it noted that the words "or a reference to it under section 20(3)" were introduced by an amendment in 1975, bringing a non-union member under the scope of the award in this section 30. Be it also noted that section 16A which was repealed and replaced by section 20 contained provisions for the alternative award of compensation in lieu of reinstatement. Any suggestion therefore that this award of compensation is now lost to the workman must mean that Parliament has deliberately taken a step which cannot but be regarded as entirely retrograde and which is therefore completely at variance with the social legislation in the Act.

It is nevertheless suggested that under section 30(6) all that the Industrial Court may award are wages for the period between dismissal and reinstatement in addition to reinstatement. The provision is said to be ancillary and not in the alternative. *Pasmore* v. *Oswaldtwistle U.D.C.*[12] is cited to and accepted by the High Court as an authority for the proposition that where an Act creates an obligation and provides a remedy, no other remedy can be adopted. In short, the contention of the Hospital is that the extension of a section 30 award to a reference under section 20(3) is an excess of jurisdiction save in the limited award of wages for the interim period until reinstatement and has no effect where the Industrial Court does not order reinstatement; in other words, all or nothing.

With all respect, this interpretation clearly flies in the teeth of the plain provisions of subsections (1), (5) and (6). It ignores the jurisdiction given to the court to make an award "relating to all or any of the issues in dispute." The right to compensation must be an issue in representations for reinstatement and necessarily arises where the court would not order reinstatement. And this is apart from the duty of the court to act according to "equity, good conscience and the substantial merits of the case without regard to technicalities and legal form." "The court shall not be restricted to the specific relief claimed" must, in the case of representations for reinstatement under section 20(1), which we have observed is the logical claim to be made by the workman, mean an award not only in addition to the order for reinstatement, but also in compensation for the reinstatement that the court would not award. Confirmation for this interpretation can be found in the subsequent words "may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling ... the reference to it under section 20(3)." We cannot understand how in a reference under section 20(3) an "award" that orders neither reinstatement nor compensation where the dismissal is without just cause or excuse, can be said to be in accordance with the guidelines in subsections (1), (5) and (6) or settle the reference.

We have earlier held that the representations of a workman who is not a member of a trade union are as much a trade dispute as the complaint of a number of workmen through their trade union. If we are right in our interpretation, further confirmation for our view is afforded by section 52(2) of the Act which reads in its relevant parts:

"52.(2) The provisions of this Act relating to trade dispute .... shall apply to any matter referred to or brought to the notice of the court under the Act."

We are of the opinion that upon a true interpretation, the Industrial Court may properly award compensation where the dismissal is without just cause or excuse, if, in its considered view, it does not think reinstatement should be ordered.

We therefore agree with the decision of the High Court in Penang in *Goon Kwee Phoy* v. *J. & P. Coats (M) Bhd.*,[23] when it held expressly that compensation could be awarded to a workman who had been dismissed without just cause or excuse. But in coming to its decision the High Court also expressly disagreed with the judgment in *Hotel Jaya Puri Bhd.* v. *Union of Hotel, Bar and Restaurant Workers & Anor.*,[29] a case of a reference under section 26 of the Act. In that case, the High Court, in respect of section 30(6),

"... tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix, but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly be an error of law...."

If by this is meant that the Industrial Court cannot award compensation to a workman who has been dismissed without just cause or excuse, we would disagree with it. But on the facts in that case, the court was of the view that the workmen had been dismissed "neither illegally or wrongly or improperly" and there was therefore no legal basis for the award of compensation and that we entirely agree with. It would appear that the High Court in *Goon Kwee Phoy* has entirely misunderstood the *Hotel Jaya Puri* judgment in disagreeing with it.

The High Court judgment in *Goon Kwee Phoy* was itself overruled by another division of the Federal Court for reasons to be stated and the award of the Industrial Court of compensation to a workman who had had his contract of employment terminated by due notice, but without just cause or excuse, restored. This court had therefore held that the so-called "termination simpliciter" which is not grounded on any just cause or excuse would enable the Industrial Court to award compensation if it would not order reinstatement.

4. *Lastly, does certiorari lie?*

It has now been finally settled in *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturers Employees Union & Ors.*[2] that the ouster provisions in section 29(3)(a) (now section 32(3)(a)) of the Act have removed the jurisdiction of the High Court to issue an order of *certiorari* for errors of law by the inferior tribunal, unless "it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity."

We have observed that whether Dr. Dutt was a workman within the meaning of the Act is a mixed question of law and fact. Whether he had been dismissed without just cause or excuse is a pure question of fact. No order of *certiorari* can possibly lie for error on these two grounds. The Hospital's cross-appeal must therefore be dismissed with costs.

As for the award of compensation, even assuming that the award contains one or more errors upon its face, the error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court. It is in this realisation of the proper law in the matter, as we understand him, that Mr. Peddie has not made the slightest attempt to address us on the quantum. The appeal is consequently allowed with costs here and in the court below. The award of the Industrial Court is restored.

Appeal allowed.

Solicitors: *Sri Ram & Co.; Skrine & Co.*

SYARIKAT PASIR PERDANA v. GOH PAK HOONG TRACTOR AND BUILDING CONSTRUCTION

[O.C.J. (Mohamed Zahir J.) August 17 & September 7, 1980]
[Kota Bharu — Civil Suit No. 151 of 1978]

Practice and Procedure — Adjournment — Message by telegram — Defendant sick — Solicitor unable to obtain plane seat to place of trial — No good reasons — Respect for court — Observations generally.

In this case on the date of hearing the defendants and their solicitors were absent. The solicitors for the plaintiffs mentioned for the solicitors for the defendants and produced a telegram from the latter reading: "Defendant fell sick. Unable to attend Court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows. NGAN AND TAN."

Held: before the court can grant an adjournment, there should be good reasons. In this case the telegram before the court was insufficient for it to decide in favour of granting an adjournment.

Observations on asking for adjournment by parties.

CIVIL SUIT.

Anthony Gomez for the plaintiffs and also on behalf of Messrs. Ngan & Tan, solicitors for the defendants.

Mohamed Zahir J.: The defendants are appealing against my order for having given judgment in default against them in favour of the plaintiffs.

The suit was fixed for hearing on August 17, 1980. The notice of trial was served on the defendants' solicitors on March 20, 1980.

On the date of hearing, the defendants and their solicitors were absent. Mr. Gomez, solicitor for the plaintiffs and one Ahmad bin Haji Abdullah, the manager of the plaintiff firm, were present. Mr. Gomez mentioned for the solicitors for the defendants and he produced a telegram sent by the solicitors for the defendants which reads as follows: —

"Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows. NGAN AND TAN."

The solicitors for the defendants should have booked for a seat in the plane much earlier as they